



No. 350 D & N.

Motion papers for U. S.

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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

SANTIAGO AINBA, ADMINISTRATOR, WITH
will annexed, of Frank Ely, deceased,
appellant,

v.
THE NEW MEXICO AND ARIZONA RAIL-
road Company.

No. 350.

APPEAL FROM THE ARIZONA TERRITORY SUPREME COURT.

MOTION BY THE UNITED STATES.

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This cause has been submitted upon brief, and is now under consideration by the court.

The suit involves the validity of a grant of lands in Pima County, Ariz., known as the Sonoita grant.

The brief of Mr. Rochester Ford filed in the cause shows that the foundation of the suit is the claim that the grant is a complete and perfect title and vested the fee in the grantee, and that for this reason it was not necessary, under the act of March 3, 1891, establishing the Court of Private Land Claims, for the appellant to

have his title confirmed by the United States, and that he has a right to go into the courts of Arizona and set up his title against trespassers, or those seeking to put a cloud upon it.

An examination of the record and the brief filed shows that the purpose of the suit is to have this court decide this question of jurisdiction, and declare the grant valid.

Particular attention is called to the following features in the record:

1. The suit is brought in the name of Ainsa, administrator, with the will annexed, but the will is not in the record, and there is nothing to show that the testator devised these lands in such a way as to give his personal representative a right to bring any suit respecting their title. It is true that there is an allegation on page 2 of the record that the plaintiff is the owner in fee of the lands in question, but this, it seems, in view of the fact that the suit is by an administrator, does not sufficiently set forth the title.

2. The complaint was filed June 1, 1892. (Rec., p. 3.) On June 4, 1892, the defendant entered its appearance, waiving service of process, and reserving time "to prepare its defense or *effect a compromise of this suit.*" (Rec., p. 4.)

3. On June 3, 1893, the answer was filed. It alleges that defendant "is the owner and in possession and entitled to the possession of that portion of the lands and premises described in the complaint which constitutes its roadbed, right of way, track, stations, station houses,

and all appurtenances which are held, used, or claimed as its railroad property on and across the said lands in the complaint mentioned." (Rec., p. 5.)

The record shows that the lands held by the defendant were worth "more than the sum of five thousand dollars." (Rec., p. 23.)

4. On the same day the answer was filed the case was decided. (Rec., p. 13.)

On the same day the motion for a new trial was made and overruled. (Rec., p. 14.) On the same day the bill of exceptions was signed. (Rec., p. 15.)

5. The case was heard in the supreme court of the Territory of Arizona upon a stipulation whereby the railroad company, by its counsel, entered its appearance, "not desiring to file a brief or make an oral argument." (Rec., p. 18.)

6. The cause was submitted by agreement in this court, before it was reached on the call, without any brief or argument on behalf of the railroad, notwithstanding the fact that the interest of the railroad exceeded in value \$5,000.

7. Attention is called to the fact that in the fourth paragraph of the stipulation it is provided "that this statement of facts is for the purpose of this suit only, and nothing herein agreed upon shall be taken as admitted for or against either of the parties hereto in any other proceeding whatever." (Rec., p. 13.)

There is pending in this court a cause styled *Santiago Ainsa, administrator of Frank Ely, deceased, v. The United States*, which is No. 468, October term, 1895, the record number being 15708.

This record has not been printed by the appellant.

The appellant in both these causes is the same, and the grant called in question is identically the same.

Cause No. 468 is a suit which was instituted by the United States in the Court of Private Land Claims, on October 19, 1892, against the claimants of this grant. On November 20, 1892, Ainsa, administrator, etc., filed his answer to the petition of the Government, being represented by Mr. Rochester Ford, who represents him in cause No. 350. It will be observed that this answer was filed in the cause brought in the Court of Private Land Claims before the stipulation in case No. 350, which appears upon pages 12 and 13 of the record, was made.

This stipulation, paragraph 2, which is set out on page 2 of Mr. Ford's brief, says that "*at the time of the institution of this suit no proceedings for the confirmation of said grant were pending before any surveyor-general of the United States, or before Congress, or before the Court of Private Land Claims created under the provisions of the act of Congress of March 3, 1891.*"

While the recital that at the time of the institution of this suit no proceedings were pending before the Court of Private Land Claims was strictly true, yet it does not show the fact that the Government had brought a suit at the time the stipulation was made, in respect of this identical grant, and against the same party, and that this suit was then pending.

As the case now stands, on submission to the Supreme Court, with no knowledge on its part of cause No. 468,

there is nothing to show the court that the alleged perfect title to this grant is questioned.

Issues were made up in cause No. 468 in the Court of Private Land Claims, and on March 20, 1894, Ainsa filed an amended answer, which answer was in effect an original bill under the provisions of the act of Congress creating the Court of Private Land Claims, in which a confirmation of this grant was asked.

The trial was commenced on March 20, 1894, and judgment was rendered in favor of the United States, rejecting the claim and declaring the grant to be void, on March 30, 1894, from which judgment Ainsa appealed to the Supreme Court of the United States.

Questions are raised in which the Government is materially and vitally interested, to wit, the construction to be given to the provisions of the treaty of December 30, 1853, as compared with the Paris treaty of 1803.

If Mr. Ford's contention as to the proper construction to be put upon the Mesilla treaty is passed upon, the litigation now pending in the Court of Private Land Claims and before the Supreme Court of the United States on appeal, in relation to the title to lands lying within that purchase, will be materially affected without the Government being heard.

Wherefore the Solicitor-General respectfully moves that the United States be permitted to intervene in this cause and that this cause be remanded to the docket to be heard with cause No. 468, or that such other action may be taken as the court may deem proper.

HOLMES CONRAD,
Solicitor-General.